

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
UNITED STATES OF AMERICA,
:
Plaintiff,
:
-and-
:
THE VULCAN SOCIETY, INC., for itself and on behalf of
:
its members, and MARCUS HAYWOOD, CANDIDO
:
NUÑEZ and ROGER GREGG, individually and on behalf
:
of a class of all others similarly situated,
:
Plaintiffs-Intervenors,
:
-against-
:
THE CITY OF NEW YORK,
:
Defendant.
:
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**SPECIAL MASTER'S
REPORT NO. 6**

07-cv-2067 (NGG)(RLM)

MARY JO WHITE, Special Master.

The Special Master submits this report pursuant to paragraph 4 of the Court's June 1, 2010 Order Appointing Special Master (the "Appointment Order"). (Dkt. No. 448, ¶ 4). The Appointment Order requires the Special Master to submit a report at least every 90 days after the parties begin the joint development of a new firefighter eligibility exam (the "New Test"). This report covers the 90-day period from the date of Special Master's Report No. 5, April 26, 2011, to the present. What follows is a report on the parties' additional progress towards developing the New Test, which as the Court is aware, and as

announced in the City's recently issued Notice of Examination, is now scheduled to be administered from January 3 to February 3, 2012.¹

I. Progress Towards Development of the New Test

The current project plan includes six milestones: (i) job analysis; (ii) test development, which encompasses test design, development of exam content, content validation and pilot testing, criterion-related and construct validation, and development of various test forms and equivalency studies; (iii) test administration; (iv) analysis and scoring; (v) final test results; and (vi) final technical report. At the Special Master's instruction, the parties certify in writing at various points across these milestones that the test development process should proceed to the next phase in the project plan. (*See* Dkt. No. 634 at 4). To date, the parties have agreed that the development process should proceed.

To facilitate this joint effort and expeditious progress, the Special Master continues to hold scheduled standing weekly telephonic conferences with the parties. Conferences are currently calendared through October. These conferences are held (or not) based on the Special Master's assessment of the need to convene the parties. Since her last report, additional conferences were held on May 5th, 10th, 17th and 26th; June 14th and 22nd; and July 6th, 19th and 25th. In addition, on June 28, 2011, the Special Master hosted a fourth joint expert-counsel meeting at the offices of her law firm. In addition, the experts

¹ The experts continue to caution that the project schedule may change depending on the results of the validation studies discussed below. This timeline continues to assume that the City will use the Candidate Physical Ability Test ("CPAT") in the New Test in the same manner it did when selecting candidates who took Exam 6019. The Special Master is currently considering a request by the Plaintiff and Plaintiffs-Intervenors that a criterion validation study be performed for the physical component of the New Test.

continue to hold a standing weekly telephonic conference with each other. Since the Special Master's previous report, the experts have held telephonic conferences on April 29th; May 6th, 12th and 23rd; June 10th and 30th; and July 11th and 18th. In addition, they have held in-person meetings on June 21st to 22nd and July 21st.

A. Developing Exam Content

The experts have now created a preliminary experimental form of the test. As indicated in the prior report, the format of the New Test will be different from prior tests – it will be computer-based, include video and audio components, and incorporate a range of item types, including multiple-choice, interactive and open response questions. (*See* Dkt. 634 at 9). Further, as explained in the Notice of Exam, the New Test will evaluate cognitive abilities such as reading, listening, problem solving, and basic arithmetic, as well as non-cognitive abilities such as a candidates' approach to work, interaction with others, and ability to concentrate on details. These abilities and others were identified as important in the job analysis.

The test content has been reviewed by the experts for all parties, who continue to discuss and improve it. They are cognizant of the need to ensure that the New Test does not test for computer skills or any other skills that were not determined by the job analysis to be relevant to the job of a firefighter. Thus, a tutorial will be made available to candidates prior to and during the test administration period. The tutorial will familiarize candidates with using a computer, provide instruction on how to take a computer-based test, and provide candidates with sample questions that they can use to practice taking the test on a computer.

During separate in-person meetings held on June 28th and July 8th, the Special Master, along with counsel and representatives of *Amici*, the Uniformed Firefighters Association (“UFA”) and the Uniformed Fire Officers Association (“UFOA”), reviewed examples of the types of test questions that will appear on the New Test.

B. Validation Studies

An important aspect of the Test Development phase is the effort to confirm the validity of the New Test. As previously reported to the Court, the experts are seeking to validate the New Test using content, criterion, and construct validation methods.

1. Pilot/Pre-Test & Content Validation

On July 22nd, the experts administered a pilot test and a content validation session to twenty-nine firefighters and officers, representing a cross-section of firefighter companies, boroughs and races/ethnicities. Prior to the study, participants were informed that the test content is confidential, and that the results will be kept confidential. Experts for all parties and the Special Master were in attendance for the pilot as well as the content validation session.

The pilot test was administered to the incumbents in an effort to elicit feedback on administrative issues related to the exam. Such issues might include comments relating to the clarity of instructions. Experts for the United States, the Vulcan Society and the Special Master took the pilot test alongside the incumbents so as to identify any potential issues with the test and gain a better understanding of any issues raised by the incumbents. The experts have reported that certain technical and other potential issues were observed

during the pilot testing. They are working to address those issues prior to the planned criterion validation study discussed below.

The incumbents also participated in a content validation study, a form of validation that relies on subject matter experts (“SMEs”) knowledgeable in the job – usually firefighters, their supervisors and/or trainers. Accordingly, the twenty-nine firefighters and officers were asked, for instance, to comment on the extent to which certain abilities are required to perform specified test sections, and on the clarity of questions. They were also given the opportunity to ask questions and offer any additional comments. The experts are analyzing the results of this study and expect to use it to refine the content of the New Test.

2. Criterion Validation

This validation study will use statistical analysis to assess whether performance on the New Test correlates with performance on the job. For this study, close to 800 incumbent firefighters will take an experimental form of the New Test, the results of which will be compared against indicia of job and training performance, and other data. The experts’ July 21st meeting, which was attended by experts for all parties and the Special Master, focused on the planning for and analyses related to this study. The study will be completed in several steps, described below.

a. SME Performance Rating Focus Group Session

On May 20th, the experts held a review session the purpose of which was to have SMEs review and provide feedback on the job performance rating forms to be used in the criterion validation study. Twelve SMEs received instruction, and then reviewed a draft job performance rating form, and confirmed the relevance and usability of the rating

scales, performance dimensions, instructions, and related materials. John Weiner and Joseph Abraham, the City's experts; David Jones and Rand Gottschalk, the United States' experts; and Harold Goldstein, the Vulcan Society's expert, attended this session, as did Shane Pittman, the Special Master's expert. The experts used the information gathered during the session to finalize the rating form and accompanying booklet that were used in the other steps of the criterion validation.

b. Ratings Sessions

These sessions, which were designed to gather information about the job performance of the close to 800 incumbents identified to participate in the criterion study, took place on June 14th to 16th, with a make-up session on July 20th for those who were not able to attend the initially scheduled session. The supervisors of each of the participating firefighters were provided with instruction and asked to complete a confidential rating form assessing the supervisee's on-the-job performance. In creating the sampling plan for these sessions, the experts sought to ensure representation from across engine companies, ladder companies, boroughs, races/ethnicities, and gender. The sessions were conducted by the experts for the City and the United States, and the expert for the Vulcan Society observed three days of sessions. The Special Master's expert, Dr. Pittman, also observed a day of sessions. During a June 7th meeting with the unions (discussed below), the leadership of the UFOA and UFA reviewed and provided feedback on the ratings form and booklet. The experts for all parties have reported that these sessions were a success.

c. Administration to Incumbents

As the final step in the criterion validation, several hundred incumbent firefighters will take a preliminary and experimental form of the New Test. The experts will then perform a statistical analysis of the test scores and criterion data (such as evaluations of performance) to determine the degree to which a firefighter's performance on the exam predicts job performance.

3. Construct Validation

This third validation method seeks to show a relationship between the abilities being tested in the current test and a different established test, which has known validity with respect to the ability of interest. To perform this validation, the experts are including such tests, called marker tests, in the experimental version of the test being administered as part of the criterion study.

To ensure the validation studies yield accurate results, it is critical that all firefighters and fire officers who are asked to participate use their best efforts in connection with the tasks they are asked to perform. The Special Master is aware that a key step in securing this participation is to ensure that participants understand what they are being asked to do and why. To facilitate that understanding, the Special Master, parties, and experts worked together to draft and distribute a summary of the test development process. That summary was provided to the unions, and changes were made based on their comments. It provides an overview of the test development effort, explains how firefighters may be asked to participate in it, and emphasizes that any data obtained will be kept confidential and used exclusively for the purposes of conducting the study. The summary has been issued by the Fire Commissioner to participants in the ratings sessions and will be distributed to participants in the upcoming criterion study. The Special Master

has also asked the unions to consider distributing a separate statement to their membership encouraging their cooperation in the study.

The above summary describes the main progress made towards the development of the New Test since the last report. The Special Master will inform the Court of the progress on the additional aspects of the project plan in her next report.

II. Updating *Amici*²

During the April 26, 2011 meeting with the Special Master, parties, experts and union representatives (*see* Dkt. No. 634 at 11), the union representatives expressed concern over the quality of the communications they had received about the test development process. In an effort to respond to that concern, the Special Master, parties, and experts now have a standing bi-weekly conference call with the union leadership. The purpose of those calls is to update the union leadership on the status of the test development effort and to answer their questions. Calls have been held on May 27th, June 10th, June 24th, and July 22nd. Additional in-person meetings have been held on June 7th and July 8th. Chief Gala of the FDNY has been invited to participate in the bi-weekly calls as well as the July 8th meeting discussed below. He participated in the June 24th and July 22nd calls and the July 8th meeting.

III. Fees

On September 3rd, the Court approved the Special Master's Application for Approval of Proposed Budget for Special Master's Expert Consultant, which projected

² As noted, *Amici* are the UFOA and UFA. The meetings and conferences held with *Amici* prior to this report are described in the Special Master's prior report. (*See* Dkt. No. 634 at 10-11).

monthly fees of between \$7,000 to \$17,000. (Dkt. Nos. 516, 519). The Special Master has submitted her expert's fees, which as reported in the Statements of Fees and Expenses, have fallen either under or within that projected range. Her expert, Dr. Pittman, has received approved expenses and fees from the City for her fees and expenses through May. (Dkt. No. 639).

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The Special Master thanks the parties, experts, *Amici*, and Chief Gala of the FDNY for their past and continued assistance and cooperation in this joint effort. Recognizing the importance and difficulty of expeditiously developing a New Test, particularly one that involves coordinating the views and input of several interested parties, the Special Master is substantially satisfied with the progress made to date by the parties and their experts towards developing the New Test. She has continued to emphasize to the parties the need and importance for vigorous and continuous efforts toward completion of the New Test.

Pursuant to the Appointment Order, the Special Master will submit her next report within 90 days from today. (Appointment Order, ¶ 4).

/s/ Mary Jo White

Mary Jo White

Dated: July 25, 2011